Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

John Ellis Briggs
Petitioner.

v.

STATE OF MISSISSIPPI
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

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Attorney for Petitioner

I.

QUESTION PRESENTED

Whether the lower courts erred in granting Respondent's Motion for Summary Judgment when there existed genuine issues of material fact and law in favor of the Petitioner.

PARTIES IN THE PROCEEDING

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

JOHN ELLIS BRIGGS,
PETITIONER

VERSUS

STATE OF MISSISSIPPI
RESPONDENT.

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1. First, Eleventh and Fourteenth Amendments to the U. S.Constitution

2. F.R.C.P. 15

3. Rule 12(b)(6)

4. 28 U.S.C. Section 1254 (1)

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Fifth Circuit Court of Appeals in this matter filed on June 3, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix 1 to the petition and is unpublished.

The opinion of the United States district court appears at Appendix 2 to the petition and is unpublished.

JURISDICTION

The United States Court of Appeals filed its judgment on June 3, 2003. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the case at bar include First, Eleventh and Fourteenth Amendments to the United States Constitution.

STATEMENT

Your Petitioner filed a complaint alleging First Amendment Constitutional violations against the Respondent on June 29, 2001 in the United States Federal District Court, Southern District of Mississippi.

On October 15, 2001, the Respondent filed a Motion to Dismiss. Thereafter, on November 14, 2001, your Petitioner filed a response to Defendant-appellee's motion.

Finally, on August 12, 2002, Judge Gex dismissed your Petitioner's complaint in favor of the Respondent.

On September 5, 2002, your Petitioner filed his notice of appeal.

Your Petitioner asserts that the Respondent, State of Mississippi, has violated the First Amendment to the United States Constitution which prohibits the establishment of religion and prohibits the display of religious symbols on public property and/or with public funds.

Your Petitioner maintains that the Respondent has willfully and maliciously used public property and public funds to display a religious symbol, namely, the St. Andrew's (or Southern Cross), long regarded by many to reflect a particular religious heritage.

Your Petitioner asserts that he is of the Muslim faith as well as a taxpayer whose taxes are being misrepresented, misappropriated and misused whenever the Respondent displays the St. Andrew's Cross in such a menacing and threatening manner so as to exclude other faiths which may find such a religious symbol as the St. Andrew's Cross to be offensive.

Your Petitioner further contends that the display of the St. Andrew's cross in the canton of the Mississippi State flag is a violation of his Constitutional rights in that it has produced a threatening and unwelcome atmosphere, being that he is a Muslim.

The historical and original intent of the selection of the St. Andrew's Cross by Confederate leaders emphasized the fact that Confederates considered their cause to be a Christian cause.

Furthermore, the Confederates' consideration of the St. Andrew's cross as their battle emblem was based on religious consideration.

As recently as July 7, 2003, President George W. Bush, at Gorre Island, Senegal, acknowledged that the institution of slavery was cloaked in the vestiges of Christianity, albeit a hypocritical and unjust version of Christianity.

Your Petitioner finally contends that Britain, Scotland, Russia, Jamaica, Catholics, Klansmen and others currently recognize and display the St. Andrew's cross as a religious symbol.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH PREVIOUS SUPREME COURT RULINGS

Petitioner respectfully requests this Honorable Court to grant this petition for a writ of certiorari because the ruling of the 5th circuit Court of Appeals goes against previous rulings of this Honorable Court.

A. ISSUE ONE

WHETHER THE COURT ERRED IN DETERMINING THAT THE PETITIONER IS PROHIBITED FROM SEEKING EITHER LEGAL OR EQUITABLE RELIEF IN FEDERAL COURT UNDER THE ELEVENTH AMENDMENT?

The Respondent's Motion to Dismiss stated that the Petitioner's claim was barred by the Eleventh Amendment to the Constitution of the United States.

The Eleventh Amendment is stated as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign States."

The lower Court held that in order to state a cause of action under section 1983, Briggs must allege that some person, acting under state or territorial law, deprived him of a federal right. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). State agencies acting under state control cannot be subject to suit in federal court without waiver of its immunity. *Richardson v. Southern Univ.*, 188 F. #d 450, 452 (5th Cir. 1997), cert. denied 522 U.S. 1078 (1998). The Court further held that lawsuits brought against a state agency or department by citizens of that state are barred under the Eleventh Amendment. *Kinnison v. Mississippi Dep't. Of Wildlife*, 990 F. Supp. 481, 483-4 (S. D. Miss. 1998); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The Court also held that waiver of sovereign immunity will not be found unless a state has clearly shown its intent to do so, a fact which Briggs has not established. *Edelman*, 415 U.S. at 673. The Court concluded that the respondent's motion to dismiss under Rule 12(b)(6) any claims advanced by Briggs under section 1983 should be granted because the State is protected from suit seeking either legal or equitable relief in federal court under the Eleventh Amendment. See *Papasan v. Allain*, 478 U.S. 265, 276 (1986); *Hodgson v. Mississippi Dep't. Of Corrections*, 963 F. Supp. 776, 785 (E. D. Wisc. 1997) (using Seventh Circuit law to find MDOC immune from suit).

In response to Respondent's Motion to Dismiss, your Petitioner stated that while States enjoy immunity under the Eleventh Amendment, the Court has held that avoidance of the abuse of such immunity is necessary. Said avoidance can be allowed to pursue by naming the officials as Respondent. (R. 10, Petitioner's Response, pg. 1, Apx. pg. 40) In this case, the Governor and the Attorney General are the officials. See, *Ex Parte Young*, 209 U.S. 123.

Your Petitioner further asserts that suit is permissible under *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) wherein States may be subject to suit under the enforcement powers of the Fourteenth Amendment. The Fourteenth Amendment is cited herein as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In the case at bar, your Petitioner asserts that his First Amendment rights, as interpreted through the Fourteenth Amendment have been violated by the Respondent. Without the ability to bring suit against the Respondent in federal court, the Petitioner would be left without redress.

Your Petitioner further maintains that had his amended complaint been allowed to proceed, said amendment would have satisfied the Fourteenth Amendment criteria.

Based upon the foregoing, your Petitioner respectfully requests this Honorable Court to reverse the lower courts' decision and allow him to proceed against the Respondent.

B. ISSUE TWO

WHETHER THE COURT ERRED IN DETERMINING THAT PETITIONER HAD FAILED TO ESTABLISH THAT THE RESPONDENT'S USE OF THE MISSISSIPPI STATE FLAG HAD THE PRIMARY EFFECT OF ADVANCING RELIGION?

Your Petitioner asserted in his complaint that the State of Mississippi has violated the First Amendment to the United States Constitution which prohibits the establishment of religion and subsequent court rulings prohibiting the display of religious symbols on public property and/or with public funds. (R.1, Complaint, Pg. 1, Apx. pg 1)

That the State of Mississippi has willfully and maliciously used public property and public funds to display a religious symbol, namely, the St. Andrew's Cross (or Southern Cross), long regarded by many to reflect a particular heritage. (R. 1, Complaint, Pg. 1, Apx. Pg. 1)

Finally, the Petitioner asserted that he was a Miracle Muslim servant of I AM. Whose taxes are being misrepresented and misused whenever the State of Mississippi displays the St. Andrew's Cross in such a menacing and threatening manner so as to exclude other faiths which may find such a religious symbol as the St. Andrew's cross to be offensive. (R. 1, Complaint, Pg. 1, Apx. Pg. 1)

In Respondent's response to said complaint, the State maintained in their Motion to Dismiss that Petitioner's claim did not state a constitutional violation. (R. 5, Defendant's Motion, Pg. 1, Apx. Pg. 29) Your Petitioner asserts that the Respondent's statement is vague and inaccurate.

The lower court held that the Petitioner has failed to establish the State's use of the flag has the primary effect of advancing religion. (R. 20, Memo. Opinion, Pg. 7, Apx. Pg. 66)

The lower court acknowledged that Briggs contends that the alleged use of the St. Andrew's Cross in the Mississippi flag offends his particular religious beliefs and that he suffers direct harm from the use of the symbol because Mississippi tax dollars are used to support the establishment and promulgation of a particular religion. (R. 20, Memo. Opinion, Pg. 5, Apx. Pg. 64) The Court further explained that in order to facilitate determination of whether a state has engaged in improper sponsorship, financial support or active involvement of the government in religious activity, the United States Supreme Court has developed a three-part test to determine if the activity complies with the establishment clause. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Under this test, an activity does not violate the establishment clause if the following criteria are met: (1) it has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create excessive entanglement between government and religion. *Lemon*, 403 U.S. at 612-13. Entanglement can be considered as an aspect of the second part test directing an inquiry into the effect of an activity. *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997). The establishment clause "is a specific prohibition on forms of state intervention in religious affairs." *Lee, v. Weisman*, 505 U.S. 577, 592 (1992). A publicly funded program does not violate the establishment clause if: (1) it has a secular purpose; (2) it does not result in governmental indoctrination; (3) it does not define its participants by reference to religion; and (4) it does not create excessive entanglement.

The prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 594 (1989). The challenged government conduct must not be intended to endorse, or have the effect of endorsing religion. *County of Allegheny*, 492 U.S. at 592-3.

The lower court further held that a court must weigh the impact of a particular religious symbol on a reasonable observer and assess whether the government display "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. " *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984). That is to say that the effect of the challenged action is evaluated "by an objective standard, which looks only to the reaction of the average receiver of the government communication or the average observer of the government action." *Friedman v. Board of Commissioners*, 781 F. 2d 777, 781 (10th circ. 1985) (en banc).

The lower Court finally alleged that the State had asserted and the Petitioner had done nothing to refute this assertion, that the flag is flown based on its connection with the Confederacy and its historical significance in Mississippi and not to promote religion. (R. 20, Memo. Opinion, Pg. 6, Apx. Pg. 65) The State contended that any religious significance attached to the St. Andrew's Cross in connection with the Confederate flag is remote compared to the association of the symbol with the Confederacy. (R. 20, Memo. Opinion, Pg. 3, Apx. Pg. 62) The State maintained that a strict secular purpose was contemplated when the symbol was included as part of the flag.

(R. 20, Memo. Opinion, Pg. 3, Apx. Pg. 62) The court concluded that a decision by a political branch to fly a state flag is "a 'political matter' the remedy for which lies within the democratic process.'" *Daniels v. Harrison County Bd. Of Supervisors*, 722 So. 2d 136, 135 (Miss. 1998). The Court finally stated in its opinion that the flying of the Confederate battle flag by the State does not violate the Mississippi or United States Constitutions. (R. 20, Memo. Opinion, Pg. 7, Apx. Pg. 66)

In Respondent's response, the State argued that the St. Andrew's Cross was considered a "prime symbol of the Confederacy." *Coleman v. Miller*, 885 F. Supp. 1561, 1565 (N.D. Ga 1995). The Respondent further stated that the flag was initially designed as a rallying symbol for Confederate troops heading into battle to fight for, among other things, the right to continue the institution of slavery." *Daniels v. Harrison County Board of Supervisors*, 722 So. 2d 136, 139 (Miss 1998).

Conversely, your Petitioner maintained that the Saint Andrew's Cross, a religious symbol, was purposely placed in the design of the Mississippi State Flag. (R. 1, Plaintiff's Complaint, Pg. 1, Apx. Pg. 1) A square flag consisting of a blue St. Andrew's Cross emblazoned with thirteen stars on a field of red and bordered by a narrow band of white was proposed and adopted as the unofficial battle flag of the Confederate forces. This flag was formally accepted with military ceremonies by Generals Beauregard, Joseph E. Johnston and others at Centreville, Virginia in October 1861. (R. 1, Plaintiff's Complaint, Pg. 7, Apx. Pg. 1)

In examining the history of the St. Andrew's Cross, this Saltire has a Christian origin. (R. 1, Plaintiff's Complaint, Pg. 15, Apx. Pg. 1) Your Petitioner asserts that the use of the State Flag which has within its design

the St. Andrew's Cross of Christian origin violates his First Amendment Rights since he is a Muslim of Islamic faith.

The Petitioner relies upon *Allegheny County v. Greater Pittsburgh* ACLU, 492 U.S. 573 (1989) case to support his assertion that the Mississippi State Flag violates his First Amendment Rights.

The Supreme Court in *Allegheny* held that the use of the creche displayed on public property violated the Establishment Clause of the First Amendment. The Court held that "Congress shall make no law respecting an establishment of religion, or [42 U.S. 573, 59] prohibiting the free exercise thereof . . ." Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *Wallace v. Jaffree*, 472 U.S. at 52.39.

It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience. Id., at 49.

The Respondent cites *Lemon v. Kurtzman*, 403 U.S. 601, 612-13 (1971) where the Supreme Court utilized a three-prong analysis to determine whether state action establishes religion. The test seeks to determine (1) whether there's a secular
legislative purpose; (2) whether the state advances or inhibits religion; and (3) whether there is excessive government entanglement with religion.

It should be noted that the Supreme Court in *Allegheny County* also examined the Lemon case, but so concluded that the use of the creche violated the First Amendment.

In the case at bar, your Petitioner asserts that there is no secular purpose in the use of the St. Andrew's Cross. The cross has historical religious meaning. Secondly, the Respondent advances the Christian faith while it inhibits the Islamic faith whenever it uses the state flag on public property. Thirdly, the involvement of the State's use of the flag is excessive when the state legislature agreed to spend monies and require its citizens to go to the polls and vote on whether to maintain the existing state flag. Furthermore, the fact that the Respondent expends monies from the state's budget to fund said flags, is considered an entanglement with religion. [i.e., since the flag promotes the St. Andrew's cross within its flag design].

The State of Mississippi's display of the St. Andrew's Cross very vividly affiliates the State with a particular religious doctrine (Christianity) and religious organizations [Catholicism, KKK, etc.] which "view the flag in a religious light." *NAACP v. Hunt*, 891 F. 2d 1555 (11th Cir. 1990). Such a blatant admission by the 11th Circuit Court of Appeals that the KKK embraces the St. Andrew's Cross as a religious symbol should have influenced the lower court judge's hypothesis and application of *Lemon.*

Moreover, the historically religious significance of the St. Andrew's Cross in the Christian faith predates both the Klan and the Confederacy (New Standard Encyclopedia pg. C-642) as any "reasonable observer" in Catholicism, the KKK, the sons of confederate Veterans, etc. will acknowledge as well as any "reasonable observer" of any other faith will recognize. *Allegheny*, pg. 492.

Your Petitioner contends that *Allegheny* which is a United States Supreme Court case should be the controlling case.

Citing *Friedman v. Board of Commissioners*, 781 F. 2d 777 (10th Cir., 1985), the lower court contends that one should "look only to the reaction of the average receiver of the government communication or the average observer of the government action." (R. 20, Memo Opinion, Pg. 65, Apx. Pg. 60) Such a contention, which insinuates that the ignorant observer has greater constitutional rights than the informed observer, ignores *Allegheny* and its reference to Tribe 1296 wherein challenged government practices should be judged "from the perspective of a 'reasonable non-adherent.".

As a "reasonable non'adherent" to the "particular religious heritage" which the St. Andrew's Cross represent, your Petitioner-appellant should not be deprived of his constitutional rights which the Fourteenth Amendment eloquently protects simply because some officials and citizens of Mississippi may be ignorant observers concerning the historically religious significance of the St. Andrew's Cross.

The fact is that a "reasonable non'adherent" observer such as your Petitioner-appellant and a reasonable adherent observer such as Catholics do realize the historically religious significance of the St. Andrew's Cross.(R. 1, Petitioner's Complaint, Pg. 15, Apx. Pg. 1) This fact should be grounds to determine the unconstitutionality of the State of Mississippi's display of the St. Andrew's Cross on public property and/or with public funds.

Under *Lemon*, part one of the Lemon test, when applied to the display of any blatant religious symbol such as a Star of David, a Cresent Moon, a Latin Cross, a St. Andrew's Cross must certainly be deemed unconstitutional unless a St. Andrew's Cross or Latin Cross or Star of David can somehow be considered to have more of a

"secular legislative purpose" than a "religious endorsement", "religious advancement" or "religious favoritism" purpose.

The lower court's decision failed part two of the Lemon test because they have failed to "see the forest for the trees". They are looking at the Confederate battle flag without proceeding to the next logical step and asking why the St. Andrew's Cross is the "primary effect" chosen to be placed on the Confederate battle flag. According to the flawed reasoning of the lower court judge, if General Beauregard would have chosen a Star of David or a Latin Cross as the "primary effect" to be placed on the Confederate battle flag in the 1860's and if the contemporary government of Mississippi then chose to publicly display the Star of David or the Latin Cross because the state honors the Confederacy, then according to the lower court's logic such a display's "primary effect" would not be unconstitutional and should not be seen as religious "advancement", "endorsement", or "favoritism" by the "reasonable observer", or "reasonable non'adherent" or even the reasonable adherent. The lower court's decision appears to limit the synonyms for the word "advancement" to the word "proselytization". See *Allegheny* However, when closely considered, the lower court's effort to abandon the 'endorsement' inquiry in favor of his 'proselytization' test seems nothing more than an attempt to lower considerably the level of scrutiny in Establishment Clause cases. See *Allegheny*

The Supreme Court imposes no such burden on demonstrating that the government has favored a particular sect or creed. On the contrary, the Court "have expressly required 'strict scrutiny of practices suggesting a denominational preference. *Larson v. Valente*, 456 U.S. at 246.

In keeping with the unwavering vigilance that the Constitution requires" against any violation of the Establishment Clause. *Bowen v. Kendrick*, 487 U.S. 589, 623. Clause values can be eroded 'necessitates' careful judicial scrutiny of government practices that purports to celebrate or acknowledge events with religious significance. *Allegheny*

The selection of the St. Andrew's Cross by the Secessionists as the symbol to display on their battle flag was an acknowledgment by that government of an event with religious significance (the Christian belief about the crucifixion of the Apostle Andrew. (R. 1, Petitioner's Complaint, Pg. 15, Apx. Pg. 1) Such a religious acknowledgment by the original designers of the confederate battle flag is by extension a continuation of that religious acknowledgment by any current state government which displays the St. Andrew's Cross on public property and/or with public funds.

A query is imposed as to what if Mississippi legislators and executives had promoted and financed a flag referendum to choose between a circle of stars and a Latin cross or a star of David? Would the Court permit the State's action as an expression of secularism just because the majority of Mississippians were ignorant of the fact that the Latin cross of the star of David were religious symbols? At what point in history does a historical religious symbol no longer be regarded as a religious symbol?

Most recently, the 11th Circuit rendered a ruling on the display of the Ten Commandments on public property. Said ruling held that the state justices could not display such religious symbol on public property. Your Petitioner emphatically asserts that the Ten Commandments is certainly more inclusive than a St. Andrew's cross. In *Stone v. Graham, 449 U.S. 39 (1980)* this Court held that

the display of a copy of the Ten Commandments on the walls of public classrooms violated the Establishment Clause.

While the lower court cites *Lynch v. Donnelly*, the United Supreme Court has ruled in *Allegheny* that *Lynch* confirms and in no way repudiates, the longstanding constitutional principle that government may not engage in a practice that has the effect of promoting or endorsing religious beliefs. Your Petitioner asserts that the State of Mississippi through the actions of its representative officials and agents are currently engaging in a practice that has the unconstitutional effect of endorsing a particular religious belief, namely Christianity, whenever its uses public property and public funds to display the St. Andrew's Cross, a historical Christian religious symbol.

The Respondent has asserted that "to the casual observer it" [St. Andrew's Cross] is nothing more than the letter "X" containing stars. The St. Andrew's Cross is considered a "prime symbol of the Confederacy" *Coleman v. Miller*, 885 F. Supp 1561 (N.D. Ga 1995).

Citing *NAACP v. Hunt*, the Respondent asserts "although Klan members might arguably view the flag in a religious light, such an effect is quite remote." However, the religious significance of the St. Andrew's Cross predates the Klan and the Confederacy and has its origin embedded firmly in the Christian religion which not only doesn't make its religious effect "remote and incidental" but undeniably makes its religious effect paramount, as can be attested to by Catholics and Protestants who cherish the St. Andrew's Cross not as a Confederate symbol but as a Christian symbol. Additionally, the St. Andrew's Cross is recognized by the nations of
Scotland, Russia, Jamaica and others as a revered Christian symbol.

The fact that the Confederate States of America adopted the St. Andrew's Cross as the symbol to display on its battle flag in no way diminishes the religious significance of the St. Andrew's Cross. Historically and currently, the St. Andrew's Cross' religious significance far outweighs whatever political, secular or racist significance that may be attached to it by the "casual observer."

The lower court further stated in its opinion that there has been no state endorsement of this flag and nothing mandates the flying of the confederate flag in its state. *Mississippi Div. of the United Sons of Confederate Veterans v. Mississippi State Conference of NAACP Branches*, 774 So. 2d 388, 391 (Miss 2000)

However, the Respondent's invoking of the 11th Amendment as one of its reasons for dismissal speaks volumes toward the Respondent's perception of its complicity in the promotion, selection and purchasing of flags decorated with the St. Andrew's Cross and displayed on public property and/or with public funds. Those public funds are generated through taxpayers such as your Petitioner. According to the lower court, there has been no state endorsement of the St. Andrew's Cross and nothing mandates the flying of the St. Andrew's Cross in the state. If this assertion is accurate then your Petitioner asserts that the flying of such religious symbol on public grounds and inside public buildings is illegal and considered a misappropriation of public funds whenever the Defendant purchases, manufactures or uses public property to display the St. Andrew's Cross.

Based upon the foregoing, your Petitioner respectfully requests this Honorable Court to overrule the lower court's decision and allow him to proceed against the Respondent.

C. ISSUE THREE

WHETHER THE COURT ERRED IN FAILING TO SUSTAIN PETITIONER'S MOTION TO AMEND COMPLAINT?

In the lower court's opinion, your Petitioner's Motion to Amend Complaint was denied as futile. (R. 20, Memo Opinion, Pg. 66, Apx. Pg. 60)

Conversely, the Respondent stated that the Petitioner filed an Amended Complaint and properly served the State of Mississippi with service of process. (R. 19, Copy of letter from A.G., Pg. 19, Apx. Pg. 59)

Procedurally, your Petitioner initially attempted to file his original complaint pro se. Thereafter, your Petitioner retained the assistance of counsel and Petitioner's attorney immediately filed an Amended Complaint to include the governor of the State of Mississippi. (Record Excerpt - Exhibit A, pg. 2) Said Amended Complaint was forwarded to the United States District Court. The clerk's office refused to file said document because it wasn't accompanied by a Motion to Amend. (Record Excerpt - Exhibit A, pg. 1) However, at the time of the attempted filing of said Amended Complaint, no answer had been filed by the Respondent. Your Petitioner asserts that the court should have accepted his Amended Complaint pursuant to F.R.C.P. 15.

> F.R.C.P. 15 states in part as follows, to-wit:
> "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . ."

In the case at bar, your Petitioner filed his Amended Complaint immediately after retaining counsel. On December 19, 2001, the Amended Complaint was filed [but later returned by the court clerk's office], the Respondent had not filed a responsive pleading. The only document that was on file at the time of filing said Amended Complaint was the Respondent's Motion to Dismiss. Petitioner asserts that the Respondent never filed a responsive pleading prior to his attempt to file the Amended Complaint and thus, the lower court judge erred when he refused to accept said amended pleading.

Your Petitioner respectfully requests this Court to examine his Amended Complaint which attempted to amend the parties to include the State of Mississippi and its Governor, Ronnie Musgrove as defendants. (Record Excerpt - Exhibit A, pgs. 2- 5)

The lower court held in its opinion that to state a cause of action under section 1983, Briggs must allege that some person, acting under state or territorial law, deprived him of a federal right. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (R. 20, Memo Opinion, Pg. 4, Apx. Pg. 63)

Your Petitioner asserts that the lower court indicated that he needed to allege a person in his complaint. Yet, the lower court wouldn't allow him to amend his complaint which did in fact specifically allege Governor Ronnie Musgrove as an individual who, through the State, allowed the violation of his constitutional rights. Additionally, the Respondent admitted that they were properly served with the Amended Complaint attached to the summons. The Respondent didn't object to said filing of the Amended Complaint.(R. 19, Letter from A.G., Pg. 19, Apx. Pg. 59) Since they didn't object to said submission, the Court should have allowed the amendment.

If the Constitution is indeed, as Ben Franklin asserted, "a laymen's document" then what does it say about our judicial system and the concept of "equal protection under the laws" if the layman is penalized or dismissed because of procedure or the layman's inability to afford, consult or convince a professional guardian of the law to consider his case or to represent him in the Courts? Penetrating the muffling effect of the legalese behind which Mississippi seeks to hide, the true message reflected in the rulings of the lower courts illustrates to the world how a symbol which is intended to reflect love and freedom has been usurped by the antithesis of such principles to the point where even these who claim to be Christians proudly promote the hijacking of their precious symbols by those whose actions and words are anti-Christ.

Thus, based upon the foregoing, your Petitioner respectfully requests this Court to reverse the lower court's decision and allow him to proceed on his Amended Complaint.

Therefore, based upon the foregoing, your Petitioner asserts that the Court erred in dismissing his complaint which he presented sufficient evidence to prove violations of the First and Fourteenth Amendments of the United States Constitution.

CONCLUSION

Based upon the foregoing facts, federal statutes and case law, your Petitioner respectfully requests this Honorable Court to receive this Petition for Writ of Certiorari, grant review on the issue presented.

Your Petitioner has proven through documentary evidence that his First Amendment through the Fourteenth Amendment Constitutional rights were violated.

Irrespective to Petitioner's submitted documents, the lower court erred in dismissing his complaint.

The lower court based its conclusions and findings upon erroneous facts, incorrect statements and misapplication of the law.

The lower court further placed an unreasonable burden on Petitioner to produce an individual who violated his Constitutional rights, but refused to allow an amendment that would have included said individuals.

Petitioner also contends that his case should be remanded and presented to a jury since there exists genuine issues of material facts.

Finally, your Petitioner requests that this Honorable Court will reverse and remand this case back to the lower court and allow it to proceed to trial on its merits.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Your Petitioner respectfully requests this Honorable Court to reverse the lower court's ruling and remand this case to the United States District Court for the Southern District of Mississippi to proceed accordingly.

Your Petitioner seeks justice from this court to rule according to the evidence presented.

Your Petitioner asserts that there exists genuine issues of material facts which should be heard before a trier of fact. Here, in the case at bar, your Petitioner seeks justice against those who have caused him great harm and mental anguish.

Respectfully submitted on this the 24 day of October, 2003.

La Quetta M. Golden

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 02-60737
Summary Calendar

JOHN ELLIS BRIGGS,

Plaintiff - Appellant,

vs.

STATE OF MISSISSIPPI,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Mississippi

ORDER, dated June 3, 2003, Before Garwood, Jolly and Smith Circuit Judges. Garwood presiding.

ORDER:

Appellant Briggs's pro se complaint, filed June 29, 2001, alleged that Mississippi violated the Establishment Clause of the First Amendment by using public property anf funds to fly the state flag in that the flag's union or canton square is the Confederate battle flag which displays "the St. Andrew's Cross (or Southern

Cross), long regarded by many to reflect a particular religious heritage, "and this was offensive to Briggs as he was "a Miracle Muslim." The only defendant mentioned in the complaint is the State of Mississippi. The relief requested was that "a just inquiry be made to determine whether a religious symbol, namely the St. Andrew's Cross, should be removed from display on public property" and that "the State of Mississippi. . . be made to compensate me by paying punitive damages not to exceed $77.77 million &US)."

The State moved to dismiss on the basis of the Eleventh Amendment and because the complaint did not state a constitutional violation.

On November 14, 2001, Briggs, through counsel, filed a response to the motion to dismiss.

On December 19, 2001, Briggs, through counsel, filed a motion for leave to amend the complaint. The tendered amended complaint names as defendants only the State of Mississippi and "Ronnie Musgrove." The only allegation concerning Musgrove is that he "is the governor for the State of Mississippi." All other allegations are as to the state defendant, e.g., "Defendant, State of Mississippi, has willfully and maliciously used public property and public funds to display a religious symbol, namely, the St. Andrew's (or Southern Cross), long regarded by many to reflect a particular religious heritage." The amended complaint alleges that "the display of the St. Andrew's cross in the Canton of the Mississippi State flag is a violation of his [plaintiff's] constitutional rights." The relief sought is a declaratory judgment mandating that the religious symbol, namely the St. Andrew's Cross, be removed from

display in the public places," "a declaratory judgment mandating that Defendant, State of Mississippi, found to be in violation of the First Amendment," "compensatory damages in the amount not to exceed 77.77 Million Dollars," and reasonable attorney fees and costs.

On August 12, 2002, the district court entered its memorandum opinion and final judgment, granting the State's motion to dismiss, denying Brigg's motion for leave to amend, and dismissing the case.

Discussion

Briggs appeals, raising three issues.

Eleventh Amendment

Briggs first argues that the district court erred in determining that the Eleventh Amendment barred him from seeking damages and equitable relief against Mississippi. We reject that contention. *Pennhurst State School & Hospital v. Halderman*, 104 S.Ct. 900, 908-09 (1984). As we said in *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183 (5th Cir. 1986), the Eleventh Amendment bars suit against a state or "state entity, as opposed to a state official, regardless of whether money damages or injunctive relief is sought" and section 1983 dose not override the Eleventh Amendment.

Establishment clause

Second, Briggs argues that the district court erred in holding that Mississippi's use of the St. Andrew's Cross on the state flag does not constitute a violation of the Establishment Clause.

The Mississippi state flag indisputably has the Confederate battle flag as its union or canton corner or square. See, e.g., *Mississippi*

Division of United Sons v. Ms. NAACP, 774 So.2d 388, 390 (Miss. 2000) ("While the State Flag is not simply a Confederate Battle Flag, the part of the State Flag found objectionable by the NAACP and others is the depiction of such Confederate flag in the State Flag's canton corner"). The flag was adopted in 1894, when the Mississippi legislature approved the committee report which

> ". . . recommend for the flag one with width two—thirds of its length; *with* the *union square .in width two-thirds of* the *width of the flag; the ground of the union to be red and broad blue saltier' thereon, bordered with white and emblazoned with thirteen (13) [mullets][2] or five-pointed stars, corresponding with the number of the original States of the Union;* the field to be divided into three bars of equal width, the upper one blue, the center one white and the lower one, extending the whole length of the flag, red-the national colors; the staff surmounted with a spear head and a battle-axe below; the flag to be fringed with gold and the staff gilded with gold." ld. at 391 (emphasis added).

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[1]Webster's Third New International Dictionary (1981 Ed.) states that "saltier" is the archaic of "saltire" *(id.* at 2005) It defines the adjective "saltire" as "shaped like an X". ld. For the noun "saltire" the first two meanings given are: ". . . **1 *heraldry:* an ordinary consisting of a cross formed by a bend dexter and a bend sinister crossing in the center of the field 2: an X-shaped cross; *esp:* SAINT ANDREW'S CROSS....** •" ***Id.***

[2]*See Daniels v. Harrison County Bd. of Supervisors,* 722 So.2d 136, 139 n.1 (Miss. 1998) (Banks, J., concurring)

However, in 1906 that 1894 legislation adopting the flag was (apparently inadvertently) repealed by the general repeal of all laws not included in the then enacted codification. ld. Nevertheless the 1894 flag continued to be flown as the state flag of Mississippi "by custom and usage." *Id.* at 391-92.

As reflected by, *inter alia,* the decisions in *Mississippi Div. of United Sons* and *Daniels v. Harrison County Bd. of Supervisors,* 722 So.2d 136 (Miss. 1998), the flying of the Confederate Battle Flag (alone or as incorporated in the canton square of what was assumed to be the official state flag) aroused heated controversy between those for whom it "commemorate Ed] the sacrifice made in support of the cause of the Confederacy" and those for whom it was an offensive "symbol of white supremacy" or oppression. *Daniels* at 139 (Banks, J., concurring); *see also id.* at 141. Following the decision *Mississippi Div. of United Sons* that there was no official state flag, the controversy became more active and public. In January 2001 the Mississippi Legislature enacted legislation providing that the state flag would be determined by an election to be held April 17, 2001, at which the voters would choose between two described flags, one being the identical 1894 flag and the other being a flag similar in all respects to that of 1894 except for its canton corner which would consist entirely of a blue ground (white bordered on its bottom and fly sides) with a circle of thirteen stars containing an inner circle of six stars with one

large star in its middle.[3] The voters chose the 1894 flag.

While nothing in the 1894 legislation or the 2001 legislation, and nothing in their legislative histories of which we are aware, nor anything in any of the cited decisions of the Mississippi courts, refers to the St. Andrew's Cross, we recognize that the Confederate Battle Flag has frequently been described as containing a St. Andrew's Cross. *See, e.g., Coleman v. Miller,* 885 F. Supp. 1561, 1564 (N.D. Ga. 1995) ("During the Civil War, the Confederacy adopted a square battle flag depicting a blue St. Andrew's Cross on a red field;" with picture of flag) We also recognize that St. Andrew is a religious figure, he, along with his brother Peter, being one of the twelve apostles of Christ and whose Christian ministry is recounted in the New Testament. The connection between the emblem on the Confederate Battle flag and St. Andrew is, however, another matter. Material attached to Briggs's complaint states the following
(none of which we dispute):

~2001 General Laws of Mississippi, Ch. 301.

[4]As a result, and as provided in the legislation, § 3-3-16 of the Mississippi Code was enacted to read:

> "The official flag of the State of Mississippi shall have the following design: with width twu-thirds (2/3) ~f its length; with the union (canton) to be square, in width two-thirds (2/3) of the width of the flag; the ground of the union to be red and a broad blue saltire thereon, bordered with white and emblazoned with thirteen (13) mullets or five-pointed stars,

"The letter 'x' when positioned on its side is commonly known as the Cross of St. Andrew and dates back to early Christian history. As recorded in the Holy Scriptures, Andrew was born in the city of Bethsaida on the north shore of Galilee (John 1:44), but lived in nearby Capernaum (Mark 1:21, 29) He worked with his brother Simon Peter as a fisherman.

Later on, Jesus called both Andrew and his brother Simon Peter to leave their fishing business and become His disciples (Mark 1:16-18). Andrew became one of the twelve apostles of our Lord and was active in the establishment of the early Christian Church in Palestine (Acts 1:13)

Tradition says that Andrew was responsible for spreading the Christian Faith throughout Asia Minor and Greece. For his fervent preaching and testimony of Jesus Christ, he was put to death by the Romans when he was around 85 years old in AD 69 in the city of Patras, Greece by being pinned to a cross. *At his own request, the cross was turned on its side because he felt he was not worthy to be crucified like his Lord.* ...Legend says that either a Greek monk or an Irish assistant of St. Columba called St. Rule was warned in a dream to remove the remains of St. Andrew to the 'ends of the earth' for safekeeping. This he did and was shipwrecked on the east coast of Scotland at the location which is now known as St. Andrews.

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corresponding with the number of the original States of the Union; the field to be divided into three (3) bars of equal width, the upper one blue, the center one white, and the lower one, extending the whole length of the flag, red (the national colors); this being the flag adopted by the Mississippi Legislature in the 1894 Special Session."

Another legend says that Acca, the Bishop of Hexham, a collector of relics brought the bones of St. Andrew to an existing religious center at St. Andrews, Scotland in AD 733. This became Scotland's first association with St. Andrew. After the battle with the Northumbrians of England in AD 832, the Scots adopted him as their patron Saint and the saltire as the symbol for their national slag. For hundreds of years, brave Scottish warriors have fought under this noble banner.

This same symbol is also known as ***Jacob's Cross.*** It represents the blessing of the patriarch Jacob/Israel when he crossed his arms and blessed the two sons of Joseph (Genesis 48:8-22)

Around 600 BC, the Greeks designated ***'X' as*** the letter **'chi' in their alphabet which in New Testament times came to represent *Christ.*** Therefore, the letter X, when used alone **or** in combination with other letters, often stands for the word ***Christ,*** as in ***Xmas."*** (italics added)

We are unable to accept, however, that every X, or every X the straight-line connection of whose four points would form a square, is predominately a religious symbol.[5]

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[5]Moreover, nothing in the religious aspect of the St. Andrew's Cross consists of anything other than a cross on its side. Neither color nor the presence of stars is a part of that. The Scottish f lag, for example, is a rectangle with a blue field on which is an unadorned white cross whose points end at each of the rectangle's corners. The Confederate Battle flag is a square, with a red field on which is *set* a white bordered blue cross reaching each corner of the square arid containing 13 white stars.

We have noted three different *tests* used to determine whether governmental action violates the Establishment Clause. *See Freiler v. Tangipahoa Parish Bd.,* 185 F.3d 337, 343 (5th Cir. 1999).

One of these tests is 'the coercion test" which "analyzes school-sponsored religious activity in terms of the coercive effect that the activity has on students." *Id.* That *test* is facially inapplicable here. Moreover, the mere display on public property of the *state* flag, or the use of public funds for that purpose, is in no meaningful sense either a religious activity or coercive. See, e.g., *Coleman v. Miller,* 117 F.3d 527 (11th Cir. 1997) (Georgia *state* flag incorporating the Confederate Battle flag); *N.A.A.C.P. v. Hunt,* 891 F.2d 1555 (11th Cir. 1990) (Confederate flag flown on Alabama capitol dome); *Mississippi Div. off United Sons; Daniels.* See *also, e.g., Murray v. City of Austin, 947* F.2d *147* (5th Cir. 1991)

The tests more relevant here are those of *Lemon v. Kurt zmaz2,* 91 S.Ct. 2105 (1971), and the "endorsement test." *Freiler* at 343. Under the former, "a state practice is unconstitutional if (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion." *Id.* "[T]he endorsement" test "seeks to determine whether the government endorses religion by means of the challenged action." *Id.*

Plainly, *Lemon 's* first prong is fully satisfied here. To the extent that a religious symbol-the St. Andrew's Cross-is displayed, it is displayed only insofar as it is included within the Confederate Battle flag which forms the union or canton corner of the Mississippi state flag.

It is obvious-and Briggs does not allege otherwise—that at least a purpose of having the Confederate Battle flag as the canton corner of the Mississippi state flag is and was secular.[6] As stated in *Hunt,* "[i]t is clear that whether the [Confederate] flag was hoisted to decry integration or the recognize history, the purpose of its hoisting was secular." *Id.* at 1564. It is similarly clear that *Lemon's* third prong-that the challenged action not excessively entangle government with religion-is likewise satisfied here. As reflected by materials attached to Briggs's complaint, the State of Mississippi did not design the Confederate Battle flag. In 1894 (and again in 2001, when the State, in essence, declined to change the flag it had consistently flown for over a century), Mississippi merely prescribed as the canton corner of the State flag the identical design which had been created by Confederate generals Beauregard and Joseph E. Johnson in 1861, and thereafter had been used by Confederate forces throughout the Civil War and became well known at least throughout the South. These one time, isolated decisions, and the flying of the state flag pursuant thereto, do not comprehend, require or lead to any involvement by the government with any religious institution or group or any interaction between the government and any such institution or group.

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[6] "*Lemon's* first prong does not require that challenged state action have been enacted in furtherance of exclusively, or even predominately, secular objectives." *Freiler* at 344. *See also, e.g., Lynch v. Donnelly,* 104 S.Ct. 1355, 1362-63 & n.6 (1984).

We turn now to the second prong of the *Lemon* test and to the related endorsement test. We have suggested that these tests are similar. *Freiler* at 346. As the Eleventh Circuit stated in respect to Alabama's flying of the Confederate flag "[i]t is also clear that the primary effect of the flag is not to promote religion; rather it is to remind citizens, albeit offensively to some, of a controversial era in American history." *Hunt* at 1564. It is common knowledge that public reaction to and the debate over the flying of the Confederate Battle flag, or its being a part of a state flag, has been virtually exclusively in relation to its symbolism of the Confederacy and the valor of its troops and whether or to what extent this symbolism extols or excuses slavery, racial oppression or resistance to racial equality. None of this concerns any religious symbolism related to any presence of the St. Andrew's Cross in the flag.[7] Neither the endorsement test nor the second prong of *Lemon* is violated where any endorsement of or benefit to religion by the challenged governmental action is merely "indirect, remote, or incidental." *Lynch v. Donnelly* 104 S.Ct. 1355, 1364 (1984) (internal quotation marks omitted) . In making this determination we focus on the display as an entirety, and on its contextual history, not merely on the portion of the display claimed to constitute a religious symbol. *Lynch* at 1360-61, 1364; *Murray* at 154-55. necessarily precluded so long as some

[7] *See, e.g., Coleman v. Miller,* 885 F. Supp. 1561, 1569 (N.D. Ga. 1995) (concerning the Georgia state flag, adopted in 1956 to include the Confederate Battle flag to "[t]o some, it represents the undeniable fact that Georgia was a member of the Confederacy and did secede from the Union. The flag may also represent southern

passerby would perceive a governmental endorsement" of religion) As Justice O'Connor explained in *Capitol Square:*

> the endorsement test creates a more collective standard to gauge 'the "objective" meaning of the [government's] statement in the community,' *Lynch, supra,* at 690, 104 S.Ct., at 1368 (O'CONNOR, J., concurring). In this respect, the applicable observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.' W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 175 (5th ed. 1984) Thus, 'we do not ask whether there is any person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion.' *Americans United,* 980 F.2d at 1544. There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.

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heritage, the old South, or values of independence. Undeniably, to others it represents white supremacy, rebellion, and discrimination"); *Coleman v. Miller,* 912 F. Supp. 522, 530 (N.D. Ga. 1996), *aff'd,* 117 F.3d 527, 530 (11th Cir. 1997) ("the Georgia flag conveys mixed meanings: to some it honors those who fought in the Civil War and to others it flies as a symbol of [racial] oppression"); *Daniels* at 139-40 (Banks, J., concurring); *Mississippi Div. of United Sons* at 390.

It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears. ... Nor can the knowledge attributed to the reasonable observer be limited to the information gleaned simply from viewing the challenged display." *Id.* at 2455 (O'Connor, J., concurring)

It is clear to us that, as a matter of law, despite what Briggs himself or some others might perceive, the objective meaning in the community of Mississippi's display of its flag is not the State's endorsement of religion or any particular religion, and that any endorsement of or benefit to religion from that display is at most indirect, remote and incidental. The flag fails neither the second prong of *Lemon* nor the endorsement test.

We have held that governmental display of symbols which were more obviously and directly religious did not violate the Establishment Clause. In *Murray* we sustained summary judgment dismissal of an Establishment Clause claim predicated on Austin's official insignia (displayed on its vehicles, letterhead, uniforms and some of its buildings) containing the coat of arms of its founder, Stephen F. Austin, which included the Christian cross used only by the Roman Catholic denomination and which is in a far more unique form than the

150, 159.[8] *See also, e.g., O'Hair v. Blumental,* 588 F.2d 1144 (5th Cir. 1979) in which we affirmed, on the basis of the district court's opinion, *O'Hair v. Blumenthal,* 462 F. Supp. 19 (W.D. Tex. 1978), the grant of a motion to dismiss for failure to state a claim of a suit raising an Establishment Clause challenge to our national motto "In God We Trust" and its appearance on our coins. The same holding was made by the Tenth Circuit in *Gaylor v. United States,* 74 F.3d 214 (10th Cir. 1996).

We hold that the Mississippi flag does not violate the Establishment Clause.

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[8] In rejecting the Establishment Clause claim in *Murray* we stated: I n considering the Establishment Clause challenge to Austin's insignia, we must recognize the reason for the cross originally being in the coat of arms; that Austin did not have an improper purpose in adopting the insignia; its long and unchallenged use; its non-proselytizing effect; that in its context, it does not endorse religion in any true or meaningful sense of the word "endorsement"; and that requiring the City to remove all displays of the insignia, arguably evinces not neutrality, but instead hostility, to religion." *Id.* at 158.

Leave to Amend

Finally, Briggs asserts that the district court abused its discretion in denying his motion for leave to amend his complaint. The district court did not abuse its discretion because, for the reasons above stated, the proposed amended complaint could not survive a FED. R. CIV. P. 12(b) (6) motion and allowing Briggs to amend the complaint would be futile. *See Lewis v. Fresne,* 252 F.2d 352, 360 n.7 (5th Cir. 2001).

AFFIRMED.

All these factors are present here in favor of Mississippi, and indeed the here challenged symbol, to the extent that it is religious, is certainly less overtly and obviously so than the Christian cross in *Murray. See id.* at 149, 150, 159.

[9]We also note that the proposed amended complaint insofar as it named the State of Mississippi as a defendant was still subject to dismissal under the Eleventh Amendment. Insofar as the proposed amended complaint named Governor Musgrove it fails to allege action (or inaction) on his part or any relationship he has or had to the flying of the flag.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JOHN ELLIS BRIGGS — PLAINTIFF

VERSUS — CIVIL ACTION NO. 1:01cv267GR

STATE OF MISSISSIPPI — DEFENDANT

MEMORANDUM OPINION

This cause is before the Court on the motion of the defendant, the State of Mississippi [State], to dismiss]5-1], pursuant to Federal Rules of Civil Procedure 12(b)(5) and (6). Also pending before the Court is the plaintiff's motion to amend [12-1] his complaint. After due consideration of the pleadings, the evidence of record, applicable law, and being otherwise duly advised in the premises, the Court finds as follows:

Statement of Facts

This suit was filed on June 29, 2001, alleging that the State violates the First Amendment to the United States Constitution through its use and display of the State flag. (Compl., pg. 1) Briggs contends that the State flag contains the St. Andrew's or Southern Cross in its canton, and that the St. Andrew's cross is a religious symbol connected with a particular religious heritage. (Id., p. 2) Briggs indicates he is a Miracle Muslim and finds the display of the State flag containing the St. Andrew's cross to be "menacing and threatening" because its

use excludes other faiths which may find such a symbol offensive. (Id., p. 1.) Briggs asserts that the use of the symbol violates the First Amendment which prohibits the display of religious symbols on public property through the use of public funds. (Id., p. 2) Briggs seeks a "just inquiry" into the issue of whether a religious symbol, namely the St. Andrew's cross, should be removed from display on public property or when public funds are used. (Id.) He claims that the State should be found in violation of the United Sates Constitution and that he should be compensated by payment of punitive damages in the amount of $7.77 million dollars. (Id.)

According to the State in its motion to dismiss, process was improperly served by utilizing the United States mail. (Mot. to Dismiss, p. 2) Under Mississippi law, service on the State or nay one of its departments, officers or institutions can be only perfected by delivering a copy of the summons and complaint to the Attorney General of the State of Mississippi, and cannot be accomplished by mail. MISS RULES OF CIV. P. 4 (d) (5). In addition, effective service of process may only be had by sheriff or process server. (Id.) The plaintiff mailed a copy of the complaint and summons to "Mr. Eric Clark, Mississippi Secretary of State, P.O. Box 136, Jackson, MS 39205-0220." (Ct. R., Doc. 4.)

Subsequent to this motion, Briggs filed a motion to amend his complaint. (Ct. R., Doc. 12.) That motion and proposed amended complaint was filed on December 19, 2001, and the defendant withdrew its motion based on insufficiency of service of process following receipt of these documents. (Ct. R., Docs. 12, 19)

According to the State, any claim asserted under 42 U.S.C. § 1983 against the State for acts taken in their official capacities are barred by the Eleventh Amendment of the United Sates Constitution. (Id., p. 3.) The defendant asserts that the

Eleventh Amendment bars claims for damages and equitable relief. (Id.)

Finally, the State maintains that nay use of the Confederate flag is constitutional. Id., p.4.) The State asserts that the flag does not impinge on Briggs' First Amendment right to free speech. (Id.) The State argues that Briggs has not advanced a claim for a constitutional violation. (Id., p. 5.) The State maintains that the use of the St. Andrew's Cross on the Mississippi flag has a secular purpose and does not constitute government entanglement with religion. (Def.'s Supp. Memo., pg. 3) The State asserts that the St. Andrew's Cross is a symbol of the Confederacy, not a symbol of a particular religious belief. (Id., p.2.)

The plaintiff argues that there is no secular purpose in the use of the St. Andrew's Cross, and that the State advances Christian faith and inhibits Islamic faith whenever the state flag is used on public property. (Pl.'s Reb., pg. 3) He contends that the State's involvement in religion through the use of the flag is excessive because state funds were utilized in requiring citizens to vote on whether to continue suing the existing state flag, or adopt another version. (Id.)

Standard of Review

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *Blackburn v. City of Marshall,* 42 F. 3d 925, 931 (5th Cir. 1995). In reviewing the sufficiency of a complaint, and when ruling upon a motion to dismiss, the Court must accept as true all material allegations in the complaint and must construe the complaint in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416, U.S. 232, 236 (1974).

Discussion

I. Motion to Amend Complaint

Rule 15 of the Federal Rules of Civil Procedure allows amendment of pleadings under certain circumstances and that "leave shall be freely granted when justice so requires." FED.R.CIV.P. 15(a). Rule 15 provides that a party may amend its pleading after a responsive pleading has been served"...only by leave of the court or by written consent of the adverse party." FED.R.CIV.P. 15 (a). The applicable standard provides that: "[i]n the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be 'freely given'." Foman v. Davis, 371 U.S. 178, 182 (1962) (quoting FED.R.CIV. P. 15(s)); see *In re Southmark*, 88 F. 3d 311, 315 (5th Cir. 1996). A motion to amend may properly be denied for futility. See *Foman*, 371 U.S. at 182. A motion to amend is futile if, among other things, the amended complaint could not survive a motion brought under Federal rule of Civil Procedure 12(b)(6). *Lewis v. Fresne*, 252 F. 3d 352. 360 (5th Cir. 2001). Accordingly, the Court will address the defendant's motion to dismiss prior to determining whether to grant the plaintiff's motion to amend.

II. Motion to Dismiss for Failure to State a Claim

A. General Claims Under Section 1983

To state a cause of action under section 1983, Briggs must allege that some person, acting under state or

territorial law, deprived him of a federal right. *Gomez v. Toledo,* 446 U.S. 635, 640 (1980). State agencies acting under state control cannot be subject to suit in federal court without waiver of its immunity. *Richardson v. Southern Univ.*, 118 F. 3d 450, 452 (5th Cir. 1997), cert. Denied 522 U.S. 1078 (1998). Lawsuits brought against a state agency or department by citizens of that state are barred under the Eleventh Amendment. *Kinnison v. Mississippi Dep't. Of Wildlife*, 990 F. Supp. 482, 483-4 (S.D. Miss 1998); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Waiver of sovereign immunity will not be found unless a state has clearly shown its intent to do so, a fact which Briggs has not established. *Edelman,* 415 U.S. at 673. The Court concludes that the defendant's motion to dismiss under Rule 12 (b)(6) any claims advanced by Briggs under section 1983 should be granted because the State is protected from suit seeking either legal or equitable relief in federal court under the Eleventh Amendment. See *Papasan v. Allain*, 478 U.S. 265, 276 (1986); *Hodgson v. Mississippi Dep't. Of Corrections,* 963 F. Supp 776, 785 (E.D. Wisc. 1997) (using Seventh Circuit law to find MDOC immune from suit).

B. First Amendment Claim

Briggs contends that the alleged use of the St. Andrew's Cross in Mississippi flag offends his particular religious beliefs and that he suffers direct harm from the use of the symbol because Mississippi tax dollars are used to support the establishment and promulgation of a particular religion. (Pl.'s Reb., pg. 3.) To facilitate determination of whether a state has engaged in improper sponsorship, financial support or active involvement of the government in religious activity, the United States Supreme Court has developed a three-part test to determine if the activity complies with the establishment clause.

See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Under this test, an activity does not violate the establishment clause if the following criteria are met: (1) It has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create excessive entanglement between government and religion. *Lemon*, 403 U.S. at 612-13. Entanglement can be considered as an aspect of the se4cond part test directing an inquiry into the effect of an activity. *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997). The establishment clause" is a specific prohibition on forms of state intervention in religious affairs." *Lee vs. Weisman*, 505 U.S. 577, 591 (1992). A publicly funded program does not violate the establishment clause if: (1) it has a secular purpose; (2) it does not result in governmental indoctrination, (3) it does not define its participants by reference to religion; and (4) it does not create excessive entanglement. The prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 594 (1989). The challenged government conduct must not be intended to endorse, or have the effect of endorsing religion. *County of Allegheny*, 492 U.S. at 592-3.

A court must weigh the impact of a particular religious symbol on a reasonable observer and assess whether the government display "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984). That is to say that the effect of the challenged action is evaluated "by an objective standard, which looks only tot he reaction of the average receiver of the government communication or the average

observer of the government action." *Friendman v. Board of Commissioners*, 781 F. 2d 777, 781 (10th Cir. 1985) (en banc).

The State has asserted, and the plaintiff has done nothing to refute this assertion , that the flag is flown based on its connection with the Confederacy and its historical significance in Mississippi and not to promote religion. (Def.'s Suppl., pp. 1-2) The State contends that any religious significance attached to the St. Andrew's Cross in connection with the Confederate flag is remote compared to the association of the symbol with the Confederacy. (Id., p. 3.) The State maintains that a strict secular purpose was contemplated when the symbol was included as part of the flag. (Id.)

To violate the Establishment Clause the religious benefit may not be incidental or remote *Smith v. Board of Sch. Comm'rs of Mobile County,* 827 F. 2d 684, 691 (11th Cir. 1987). There has been no state endorsement of this flag and nothing mandates the flying of the confederate flag in this state. *Mississippi Div. Of the United Sons of Confederate Veterans v. Mississippi State Conference of NAACP Branches,* 774 So. 2d 388, 391 (Miss. 2000). A decision by a political branch to fly a state flag is "a 'political matter' the remedy for which lies within the democratic process." *Daniels vs. Harrison County Bd., of Supervisors,* 722 So. 2d 136, 135 (Miss 1998). The flying of the Confederate battle flag by the State does not violate the Mississippi or United States Constitutions. *NAACP v. Hunt,* 891 F. 2d 1555 (11th Cir. 1990); *Coleman v. Miller*, 912 F. Supp. 522 (N.D. Ga 1996), aff'd 1717 F. 3d 527 (11th Cir. 1997); *Mississippi Div. Of United Sons of Confederate Veterans,* 774 So. 2d at 389. The court concludes that the use of this symbol is a result of a secular, historical purpose which does not have the primary effect of promoting religion. *Capitol Square Review & Advisory Bl, v. Pinette,* 515 U.S. 753, 75 (1995). The use of a historically significant symbol does not

have the primary purpose of advancing religion. *Murray v. City of Austin*, 947 F. 2d 147, 155 (5th Cir. 1991), cert. Denied 505 U.S. 1219 (1992). All citizens who may perceive a religious significance in the appearance of the flag is intended to achieve this reaction form embers of these religious groups. See i.e., *Hunt,* 891 F. 2d at 1562. The Court concludes that the State's motion to dismiss should be granted because Briggs has failed to establish the State's use of the flag has the primary effect of advancing religion. The Court finds the plaintiff's motion to amend his complaint should be denied as futile.

Conclusion

For the reasons set forth above, this Court finds that the State's motion to dismiss for failure to state a claim upon which relief may be granted [5-1] pursuant to Federal Rule of Civil Procedure 12(b) should be granted. Accordingly, the Court concludes that the plaintiff's motion to amend his complaint [12-1] should be denied. A separate judgment in conformity with and incorporating by reference the foregoing Memorandum Opinion shall issue. Each party shall bear their respective costs in association with this motion.

THIS the 12th day of August, 2002.

"S/WALTER GEX"
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

John Ellis Briggs
PLAINTIFF,

versus

CIVIL ACTION NO.:
101cv267GR

State of Mississippi
DEFENDANT.

FINAL JUDGMENT

This cause is before the Court on motion of the defendant, the State of Mississippi [State], to dismiss [5-1], pursuant to Federal Rules of Civil Procedure 12(b)(5) and (6). Also pending before the Court is the plaintiff's motion to amend [12-1] his complaint. Pursuant to the Memorandum Opinion entered in this cause, this date, incorporated herein by reference, it is hereby,

ORDERED AND ADJUDGED that the State's motion to dismiss [5-1] be, and is hereby granted, It is further,

ORDERED AND ADJUDGED that the plaintiff's motion to amend [12-1] be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the plaintiff's claims against the defendant be, and are hereby, dismissed with prejudice. It is further,

ORDERED AND ADJUDGED that each party bear their respective costs in connection with these motions.

SO ORDERED AND ADJUDGED this the 12th day of August, 2002.

"S/WALTER GEX"
UNITED STATES DISTRICT JUDGE